PERBADANAN KEMAJUAN NEGERI KEDAH v. CBH RUBBER SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
AZAHAR MOHAMED JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: K-01(NCVC)(W)-10-01-2014]
24 FEBRUARY 2016

CONTRACT: *Specific performance – Agreement – Proposal to take over operations of factory – Proposal approved by members of corporation – Proposer sent agreements but corporation later decided not to continue with proposal – Whether approval of proposal constituted binding contract – Whether there was binding contract between parties – Whether agreements could be enforced*

The appellant ('the defendant') was the registered proprietor of a piece of land together with a factory ('the factory') erected thereon to process, *inter alia*, natural rubber. The respondent ('the plaintiff') had prepared a proposal paper ('the proposal') to take over the operations of the defendant's factory and had forwarded to the latter a draft of the investment and sub-lease agreements ('the agreements'). In a letter dated 22 November 2011, the defendant informed the plaintiff that the proposal had been approved in a meeting by the defendant's members on 25 September 2011. However, after several discussions, the defendant informed the plaintiff that the defendant's Board of Directors decided not to continue with the proposal. Anchored on the contention that there was a binding contract between the parties, the plaintiff claimed against the defendant at the High Court for, *inter alia*, specific performance of the agreements or in the alternative, a declaration that it was entitled to the enforcement of the agreements approved by members of the defendant ('the declaration'). In refuting the plaintiff's claim, the defendant argued that there never was a binding contract reached between the parties. Despite making an express finding of fact that there had not, in actuality, been an agreement as at 25 September 2011, the Judicial Commissioner ('the JC') granted the declaration. Hence, the present appeal.

Held (allowing appeal with costs)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The letter dated 22 November 2011 explicitly stated that 'your proposal was approved' and 'subject to the finalisation of which it will be vetted and endorsed by the Kedah State Legal Advisor'. There had never been a binding contract reached between the plaintiff and the defendant which was duly approved by the defendant's members on 25 September 2011. (para 22)

(2) The JC granted the declaration but made a firm and definite finding that on 25 September 2011, the defendant's members only approved the proposal and not any agreement. In view of such findings, there was therefore no legal basis at all to grant the declaration. This warranted appellate intervention as there was a lack of judicial appreciation on the part of the JC. (paras 21 & 23)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') ialah pemilik berdaftar sebidang tanah serta sebuah kilang ('kilang') yang terbina di atasnya untuk memproses, antara lain, getah asli. Responden ('plaintif') telah menyediakan satu kertas cadangan ('cadangan') untuk mengambil alih pengendalian kilang dan mengemukakan kepada defendan satu draf perjanjian pelaburan dan pajakan kecil ('perjanjian-perjanjian'). Melalui surat bertarikh 22 November 2011, defendan memaklumkan plaintif bahawa cadangan telah diluluskan dalam satu mesyuarat ahli-ahli defendan pada 25 September 2011. Walau bagaimanapun, selepas beberapa perbincangan, defendan memaklumkan plaintif bahawa Lembaga Pengarah defendan memutuskan untuk tidak meneruskan dengan cadangan tersebut. Bersandar pada hujahan bahawa wujud kontrak mengikat antara pihak-pihak, plaintif menuntut terhadap defendan di Mahkamah Tinggi bagi, antara lain, pelaksanaan spesifik perjanjian-perjanjian atau secara alternatif, satu deklarasi bahawa plaintif berhak menguatkuasakan perjanjian-perjanjian yang diluluskan oleh ahli-ahli defendan ('deklarasi'). Menyangkal tuntutan plaintif, defendan mendalihkan bahawa tidak wujud kontrak mengikat antara pihak-pihak. Walaupun Pesuruhjaya Kehakiman ('PK') membuat satu dapatan fakta yang jelas bahawa hakikatnya tiada perjanjian pada 24 September 2011, namun beliau membenarkan deklarasi. Oleh itu, timbul rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Surat bertarikh 22 November 2011 jelas menyatakan 'your proposal was approved' dan 'subject to the finalisation of which it will be vetted and endorsed by the Kedah State Legal Advisor'. Tiada kontrak mengikat antara plaintif dan defendan yang diluluskan oleh ahli-ahli defendan pada 25 September 2011.

(2) Pesuruhjaya Kehakiman membenarkan deklarasi tetapi membuat dapatan kukuh dan pasti bahawa pada 25 September 2011, ahli-ahli defendan hanya meluluskan cadangan dan bukan apa-apa perjanjian. Berdasarkan dapatan sedemikian, tiada asas undang-undang sama sekali untuk membenarkan deklarasi. Ini mewajarkan campur tangan rayuan kerana tiada pertimbangan kehakiman oleh PK.

Case(s) referred to:
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

For the appellant - Shahul Hameed Amirudin (Natalia Izra Nasaruddin with him); M/s Zul Rafique & Partners
For the respondent - P Latsmanan; M/s Khor Gaik Thiam & Latsmanan

[Editor's note: For the High Court judgment, please see CBH Rubber Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2013] 1 LNS 1058 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed JCA:

[1] This was an appeal by the appellant, Perbadanan Kemajuan Negeri Kedah (the defendant in the High Court) against the whole of the decision of the learned Judicial Commissioner ("JC") of the High Court at Alor Setar whereby the learned JC allowed the claim by the respondent, CBH Rubber Sdn Bhd (the plaintiff in the High Court) against the appellant and made, among others, the following orders:

(a) A declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011; and

(b) The defendant is to pay to the plaintiff general damages that are to be assessed by the court.

[2] We heard the appeal, wherein at the conclusion of the hearing we unanimously allowed it with costs. We now give our reasons for so deciding. We shall be referring to parties in this judgment in their respective capacity in the High Court.

[3] The plaintiff is a private limited company. Prior to 21 September 2011, the plaintiff was formerly known as "Newterm Realty Sdn Bhd". The plaintiff was incorporated, *inter alia*, for the purpose of dealing in rubber based products and activities.

[4] The defendant is a statutory body incorporated pursuant to s. 3 of the Kedah Development Corporation Enactment No. 5 of 1965 ("Enactment"). The defendant's duties as set out in s. 11 of the Enactment are amongst others, to promote or undertake any residential, industrial, agricultural and commercial development of areas in the State of Kedah designated for such purpose; and to promote or undertake any kind of business, trading and commercial enterprises including agricultural, industrial, housing and mining enterprises in the State of Kedah.

A **[5]** The defendant at all material times, was the registered proprietor of a piece of land measuring approximately 52 acres ("the land") together with a factory plant erected thereon known as Kilang Hevea Bukit Perak situated in Padang Lembu, Gurun, Kedah ("the factory") to process, *inter alia*, natural rubber.

B **[6]** At all material times, the factory was operated and managed by a company known as Kilang Hevea Bukit Perak Sdn Bhd, ("Kilang Hevea") which was a company 100% owned by the defendant.

[7] A proposal paper ("the proposal") dated 8 June 2011 to take over the operations of the factory was prepared by the plaintiff and Asian-Hopes (HL Ltd) ("Asian-Hopes"). Asian-Hopes was the majority shareholder in the plaintiff company.

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[8] According to the proposal, the plaintiff and Asian-Hopes would initially invest a sum of RM60 million and a long term investment of RM600 million by way of a long term investment in respect of the takeover of the factory. The plaintiff and Asian-Hopes would also source the market for the finished rubber products. Under the proposal, the plaintiff would also pay the defendant RM80 per ton output of finished product produced; RM20 per ton for the quantity of finished products sold to buyers using the factory's licensed facilities; RM20 per ton for the quantity of finished products sold to buyers using the factory's licensed facilities; RM20 per ton for the quantity of finished products purchased directly from outside suppliers and sold to buyers using the factory's licensed facilities; and a guaranteed annual minimum amount of RM1,200,000 in the event the targeted output failed to reach the projected volume.

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[9] By way of its letter dated 24 July 2011, the defendant invited the plaintiff to provide a presentation of the proposal to the defendant's Executive Committee. The presentation was held on 25 July 2011. Upon the defendant's request, a working visit to Kun Lun Tyre Co Ltd in Xia Jiang China from 10 October 2011 to 14 October 2011 was arranged. The purpose of the visit was to enable the defendant to assess the viability of the proposal.

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[10] As at 20 November 2011, the plaintiff had only forwarded to the defendant one draft of the investment agreement and sub-lease agreement that were to be entered into between Kilang Hevea and the plaintiff.

H **[11]** At this point, it is important to note that by way of a letter dated 22 November 2011, the defendant acknowledged receipt of the draft investment agreement and draft sub-lease agreement that were to be entered into between Kilang Hevea and the plaintiff. The defendant's letter dated 22 November 2011 reads:

I

The Managing Director
CBH Rubber Sdn Bhd
68, Kompleks Alor Malai
Bt 2 Jalan Langgar
05460 Alor Setar
Kedah Darul Aman.

Dear Sir,

PROPOSAL TO LEASE THE RUBBER FACTORY IN PADANG LEMBU

This is to acknowledge that we have received the draft agreement on 20th of November 2011, pertaining to the above subject. Please take note that the draft agreement has been forwarded to our lawyers for their immediate perusal and we will hand back to you once it is ready for further discussion and finalisation.

We are also please to inform you that your proposal was approved during our Members of the Corporation meeting on the 25th September 2011 and subsequently attested on the 21st November 2011. The approval is subject to the finalisation of the said agreement of which, it will have to be vetted and endorsed by the Kedah State Legal Advisor.

The timeline to finalise the agreement with your cooperation is set on the 15th December 2011, and should be formalised by the 20th of December. Then it is anticipated that the parties concerned could occupy the premises by the 1st January 2012.

PKNK is currently making the necessary arrangements to facilitate the transfer and if all goes well, we will be able to commence the operations.

Thank you. Yours faithfully,

PERBADANAN KEMAJUAN NEGERI KEDAH

(HAJI MUSTAFAR BIN AHMAD, SDK. AMK. BCK)
Financial Controller
For Chief Executive

[12] What was stated in the above letter formed one of the contentious issues between the parties, about which more will be said at a later stage of this judgment.

[13] Between 22 January 2012 until 12 March 2012, the plaintiff and the defendant were still in the midst of discussing the proposal. In connection to this, several draft agreements were produced by and to both parties for perusal and that a number of salient terms were being amended several times.

[14] The dispute in the present case arose when by way of a letter dated 12 March 2012; the defendant informed the plaintiff that the defendant's Board of Directors had decided not to continue with the proposal. The letter reads:

Pengarah
CBH Rubber Sdn.Bhd.
No. 68, Kompleks Alor Malai
Bt 2, Jalan Langgar
05460 Alor Setar
Kedah Darul Aman.

Tuan,

PROJEK CADANGAN USAHASAMA KILANG HEVEA
BUKIT PERAK

Saya dengan hormatnya ingin merujuk kepada perkara di atas. Surat tuan bil. Rujukan CBH/KDH/PKNK 20120211/0003 bertarikh 11 Februari 2012 adalah berkaitan.

Dukacita dimakumkan bahawa Mesyuarat Ahli-Ahli Lembaga Pengarah PKNK pada 25 Februari 2012 telah membuat keputusan untuk tidak meneruskan cadangan usahasama dan penyewaan Kilang Hevea Bukit Perak kepada pihak tuan. Pihak Perbadanan ingin merakamkan penghargaan ke atas minat pihak tuan untuk menjalinkan kerjasama dengan pihak Perbadanan ini.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Dengan hormatnya,

PERBADANAN KEMAJUAN NEGERI KEDAH

(DATO' HJ. ABDUL RAHMAN IBRAHIM, DSDK, AMK., BCK)
Ketua Eksekutif

[15] This then led the plaintiff to commence the present action against the defendant by filing a writ of summons and the statement of claim on 28 December 2012. The plaintiff initiated the action against the defendant on the purported premise that there was a concluded contract between the parties herein.

[16] The reliefs sought by the plaintiff, among others, are as follows:

33. Maka Plaintif menuntut daripada Defenden di bawah Seksyen 21(3) Akta Spesifik Relif, 1950 dan/atau "inherent jurisdiction of the Court" Perintah/relif seperti berikut:

a. Defenden menandatangani dan melaksanakan secara spesifik Perjanjian-perjanjian diantara Plaintif dan Defenden yang telahpun diluluskan oleh Ahli-ahli Defenden seperti berikut:

i. Perjanjian Penyewaan;

ii. Perjanjian Pelaburan;

iii. Perjanjian Pengurusan/Pentadbiran.

b. DAN/ATAU Suatu Deklarasi bahawa Plaintif berhak kepada perlaksanaan Perjanjian-perjanjian yang diluluskan oleh Ahli-ahli Defenden pada 25/09/2011;

c. Defenden membayar ganti rugi khas kepada Plaintif sebanyak RM100,000.00;

d. Defenden membayar Plaintif kehilangan keuntungan ("loss of profits") sejumlah RM28,800,000.00 berdasarkan:

i. Keluaran minima ("finished products") (SMR) 1,000 tan sebulan;

ii. Margin keuntungan bersih RM650.00 satu tan (berdasarkan harga kawalan Lembaga Getah Malaysia);

iii. Maka keuntungan bulanan RM1,000 x RM650 = RM650,000.00;

iv. Maka keuntungan bagi 36 bulan RM650,000.00 x 36 = RM23,400,000.00.

e. ATAU Ganti rugi am ditaksirkan oleh Mahkamah;

f. Faedah.

[17] The plaintiff's claim was essentially for specific performance of agreements, special damages and damages for loss of profits. In the alternative to specific performance, the plaintiff sought a declaration that it was entitled to the enforcement of agreements approved by members of the defendant on 25 September 2011. In the main, the plaintiff anchored its claim against the defendant on the purported approval by the defendant's members of corporation at a meeting on 25 September 2011 as disclosed in the defendant's letter dated 22 November 2011, which we have reproduced earlier in the judgment.

[18] The nub of the defendant's defence was that there had never been a binding contract reached between the plaintiff and the defendant. Hence, the principal issue for determination before the learned JC was whether there were concluded agreements between the parties to which the defendant asserted that parties were still in the midst of negotiations.

[19] Before us, the principal argument raised by learned counsel for the defendant was that the learned JC had made a fundamental error in allowing a declaration when the same learned JC had also made an express finding of fact (in the grounds of judgment) that there had not in actuality been an agreement as at 25 September 2011. We found there was much force in this argument.

[20] As we have indicated earlier, the learned JC allowed the plaintiff's claim. The learned JC concluded that a binding contract had been reached between the plaintiff and the defendant. On the reliefs, the learned JC said that the plaintiff had sought specific performance of the agreements or in the

alternative a declaration that it was entitled to the enforcement of the agreements. The learned JC was inclined to grant the alternative relief since the defendant had through DW2 stated that if it continued with the proposal it would suffer losses. The learned JC therefore allowed the plaintiff's alternative relief in para. 33(b), para. 33(e) on general damages to be assessed, and para. 33(f) on interests and costs of RM25,000.

[21] In our considered view, the decision of the learned JC in allowing the plaintiff's alternative relief in para. 33(b) raised some vexed issues. On this, we have the following observations. It is relevant to note that the learned JC granted the alternative relief which was pleaded in para. 33(b) of the statement of claim as follows: "Suatu Deklarasi bahawa Plaintif berhak kepada perlaksanaan Perjanjian-perjanjian yang diluluskan oleh Ahli-ahli Defendan pada 25 September 2011" ('A declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011'). It is important to note that the learned JC granted the declaration although in her written judgment she had made a firm and definite finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement as can be seen in para. 16 of the judgment.

[22] In this regard, it is relevant to note that the letter dated 22 November 2011, with the necessary emphasis, explicitly stated, that "your proposal was approved" and "subject to the finalisation of which it will have to be vetted and endorsed by the Kedah State Legal Advisor". It is plain for us to see from a reading of the letter that there had never been a binding contract reached between the plaintiff and the defendant, which was duly approved by the defendant's members on 25 September 2011. Therefore, it is baffling as to how the learned JC could still make the declaration order.

[23] The learned JC ought to have considered that in view of her finding that the defendant's members on 25 September 2011 only approved the proposal and not any agreement, there was therefore no legal basis at all to grant a "declaration that the plaintiff has a right to enforce the agreements which were approved by the defendant's members on 25 September 2011". This indicates a lack of judicial appreciation on the part of the learned JC warranting appellate intervention (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 1 MLJ 1).

[24] It is for these reasons that we had allowed this appeal with costs of RM35,000 in favour of the defendant. The deposit was to be refunded to the defendant. We had accordingly set aside the order of the learned JC.